LEMBAGA KUMPULAN WANG SIMPANAN PEKERJA v. MOHD ABDUL KARIM ABDULLAH & ORS

HIGH COURT MALAYA, SHAH ALAM
ROZI BAINON JC
[SUIT NO: BA-22NCvC-496-12-2022]
9 AUGUST 2023

Abstract – *A defendant resisting a plaintiff's application for summary judgment, pursuant to O. 14 of the Rules of Court 2012, must demonstrate, on affidavit evidence, that the defence has not only raised an issue but also that the said issue is triable. Resistance would be futile if the arguments raised are entirely at variance from and inconsistent with either the clear position in law or the undisputed contemporary documents.*

CIVIL PROCEDURE: *Summary judgment – Application for – Outstanding Employees' Provident Fund ('EPF') contribution – Claim by EPF against directors of company – Whether summary judgment ought to be entered – Whether there were triable issues that warranted full trial – Whether plain and obvious case suitable for judgment to be granted summarily – Rules of Court 2012, O. 14*

The defendants were the directors of Serba Dinamik Group Bhd ('company'), a wound up company. The present interlocutory application stemmed from the plaintiff's suit for the outstanding Employees' Provident Fund ('EPF') contributions, together with dividends and late payment charges, against the defendants. The plaintiff sought a summary judgment, pursuant to O. 14 of the Rules of Court 2012 ('ROC'), for the defendants to be held liable to pay the outstanding EPF contributions to the plaintiff. Resisting the plaintiff's application, the defendants submitted that there were serious issues to be tried which warranted the dispute being resolved only after a full trial of the matter. The issues that arose in this application were: (i) whether the plaintiff's claims against the defendants were made *mala fide*; (ii) whether the defendants, as the directors of the company, were to be held responsible to pay for the EPF contributions; and (iii) whether the summary application ought to be entered against the defendants.

Held (allowing application):

(1) There was nothing pleaded in the defendants' defence that the plaintiff acted *mala fide*. The action for non-payment of the EPF contributions was instituted by the plaintiff and this was the statutory duty of the plaintiff. The action was not implying any bad faith, dishonest intention, corrupt motive, personal animosity or vendetta on the part of the plaintiff. (paras 27 & 28)

(2) Based on the Companies Commission of Malaysia's information/search done by the plaintiff, the nature of the company was investment holdings and the provision of management services. The issue regarding the company facing with financial crisis was irrelevant to the EPF contributions for its employees. The company had a variety of job grades/types of employees *ie,* the senior executives, executives and managers. The defendants were liable and compelled to pay for the unpaid EPF contributions that were statutory payments to the plaintiff. (paras 43 & 44)

(3) The plaintiff's application had satisfied the requirements of O. 14 rr. 1 and 2 of the ROC. The defendants failed to prove that there were issues that merited a trial. This was a plain and obvious case, with no issues to be tried, which would be suitable for a judgment to be granted summarily. The arguments raised by the defendants were entirely at variance from and inconsistent with either the clear position in law or the undisputed contemporary documents. The resistance of the defendants was futile and must, therefore, fail. (paras 53, 56 & 57)

Case(s) referred to:

Ascot International Pte Ltd v. Elevic Trading Sdn Bhd [1996] 2 CLJ 645 HC ***(refd)***

Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC ***(refd)***

Best Re (L) Ltd v. China Pacific Property Insurance Co Ltd [2018] 1 LNS 654 CA ***(refd)***

Chen Heng Ping & Ors v. Intradagang Merchant Bankers (M) Bhd [1995] 3 CLJ 690 CA ***(refd)***

Citibank NA v. Ooi Boon Leong & Ors [1980] 1 LNS 168 FC ***(refd)***

Concentrate Engineering Pte Ltd v. United Malayan Banking Corp Bhd [1990] 1 LNS 41 HC ***(refd)***

Doshi v. Yeoh Tiong Lay [1974] 1 LNS 30 FC ***(refd)***

Hijau Bumi Petroleum Sdn Bhd v. Platinum Green Chemicals Sdn Bhd & Ors [2017] 1 LNS 1253 HC ***(refd)***

Ho Lai Ying & Anor v. Cempaka Finance Bhd [2004] 1 CLJ 232 CA ***(refd)***

Juliana Quah Kooi Hong v. LFE Corporation Bhd & Anor [2021] 1 LNS 1765 HC ***(refd)***

Lembaga Kumpulan Wang Simpanan Pekerja v. Edwin Cassian Nagappan [2021] 7 CLJ 823 FC ***(refd)***

Lionel Khoo Boo Kheng v. Lembaga Kumpulan Wang Simpanan Pekerja [2016] 1 LNS 370 HC ***(refd)***

National Company For Foreign Trade v. Kayu Raya Sdn Bhd [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283 FC ***(refd)***

Pengiran Othman Shah Pengiran Mohd Yussof & Anor v. Karambunai Resorts Sdn Bhd & Ors [1996] 1 CLJ 257 CA ***(refd)***

South East Asia Insurance Bhd v. Kerajaan Malaysia [1998] 1 CLJ 1045 CA ***(refd)***

Woolley Development Sdn Bhd v. Mikien Sdn Bhd [2008] 2 CLJ 303 CA ***(refd)***

Legislation referred to:

Employees Provident Fund Act 1991, ss. 2, 46(1), 64, 65(1)

Rules of Court 2012, O. 14 rr. 1, 2, 3(1)

For the plaintiff - Adilah Abdul Wahid; M/s Nashili & Co
For the defendants - Amira Nur Nadia Azhar; M/s Rajashree

Reported by Najib Tamby

JUDGMENT

Rozi Bainon JC:

Introduction

[1] The interlocutory application filed by the plaintiff before me is for a summary judgment under O. 14 of the Rules of Court 2012 for the defendants to be held liable to pay the outstanding employees provident fund contributions to the plaintiff.

[2] On 31 May 2023, I allowed the plaintiff's application with costs. The defendants are aggrieved and appeal to the Court of Appeal.

[3] This judgment contains the reasons for my decision.

The Background Facts

[4] The plaintiff instituted a suit against all the four defendants for the outstanding employees provident fund contributions. The outstanding amounts are as follows:

(i) against the first, second and third defendants, jointly or severally, is RM2,951,000 for the period from September 2021 till July 2022 together with the dividend and late payment charge.

(ii) against the fourth defendant, is RM330,776 for the period of July 2022 together with the dividend and late payment charge.

[5] In the defence, the defendants admit as below:

(i) the defendants are the registered directors of Serba Dinamik Group Berhad (No. Pendaftaran: 200401024953/663460-T) (after this is referred to as "the company").

Based on the record, the first, second and third defendants are the directors of the company from 12 September 2006 till now and the fourth defendant is the director of the company from 9 June 2006 till now.

(ii) the company is incorporated under the Companies Act 1965. On 23 August 2022, the company has been wound up at the Kuala Lumpur High Court and a licensed liquidator was appointed as the interim liquidator for the company.

(iii) under s. 2 of the Employees Provident Fund Act 1991 (Act 452), the company is the employer *vide* Reference No: 16264504 and is responsible for the monthly payment of the EPF contribution for the employees to the plaintiff. Section 2 of Act 452 reads:

> "employer" means the person with whom an employee has entered into a contract of service or apprenticeship and includes:
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> (a) a manager, agent or person responsible for the payment of salary or wages to an "employee";
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> (b) any body of persons whether or not statutory or incorporated; and
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> (c) any Government, department of Government, statutory bodies, local authorities or other bodies specified in the Second Schedule and, where an employee is employed with any such Government, department, authority or body or with any officer on behalf of any such Government, department, authority or body, the officer under whom such employee is working shall be deemed to be an employer:
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> Provided that no such officer shall be personally liable under this Act for anything done or omitted to be done in good faith by him as an officer of such employer;

(iv) the defendants denied and put the plaintiff of a strict proof pertaining to the outstanding EPF contributions amount.

(v) the defendants pleaded as follows:

(i) Defendan-Defendan tidak pernah menerima sebarang notis dan/atau dokumen dan/atau butiran berkaitan dengan baki tunggakan amaun taksiran caruman KWSP tersebut.

(ii) Plaintif diletakkan atas beban pembuktian bahawa:

(a) baki tunggakan amaun taksiran caruman KWSP tersebut adalah bagi pekerja-pekerja yang bekerja dan/atau masih bekerja dengan Defendan Pertama bagi tempoh September 2021 hingga Julai 2022 seperti mana yang dituntut.

(b) baki tunggakan amaun taksiran caruman KWSP tersebut adalah tidak jelas dan/atau tidak tepat dan/atau tidak terperinci seperti mana yang dituntut.

(iii) kadar caj lewat yang didakwa adalah berlebihan, tidak berpatutan dan tidak menepati undang-undang.

(iv) Serba Dinamik Group Berhad menghadapi krisis kewangan pada/sekitar tahun 2021 lagi.

(v) pada 10-2-2022, Serba Dinamik Group Berhad memohon di Mahkamah Tinggi Kuala Lumpur bagi syarikat diletakkan di bawah pengurusan kehakiman dan bagi pelantikan pengurus kehakiman.

(vi) Serba Dinamik Group Berhad berniat untuk melaksanakan kewajipan statutori mereka termasuk membayar caruman KWSP bagi pekerja-pekerjanya. Sepanjang November 2021, Serba Dinamik Group Berhad sebagai majikan telah membayar caruman KWSP bagi pekerja-pekerjanya.

(vii) sejak 23-8-2022, Serba Dinamik Group Berhad digulungkan dan diletakkan dalam kuasa dan kawalan Interim Liquidator, segala urusniaga dan pembayaran diletakkan dalam kuasa dan kawalan Interim Liquidator.

(viii) tindakan undang-undang yang dimulakan oleh Plaintif adalah ketika Serba Dinamik Group Berhad diletakkan dalam kuasa dan kawalan Interim Liquidator dan Defendan-Defendan telah mengambil segala langkah-langkah untuk memastikan pematuhan obligasi majikan berkenaan dengan pembayaran caruman pekerja-pekerja.

(ix) Defendan-Defendan telah mengingatkan Interim Liquidator bahawa caruman KWSP adalah suatu kategori pembayaran statutori dan KWSP merupakan pemiutang preferential. Interim Liquidator gagal mengambil sebarang tindakan untuk membayar caruman KWSP tersebut.

[6] The defendants pray that the writ summons and statement of claim are dismissed with costs.

Reply By The Plaintiff

[7] In the reply to the defence, the plaintiff stated as follows:

(i) pada 10-1-2023, Serba Dinamik Group Berhad digulungkan di Mahkamah Tinggi Kuala Lumpur oleh HSBC Amanah Malaysia Berhad & 5 Yang lain.

(ii) bagi tempoh dari bulan September 2021 hingga Julai 2022 iaitu tempoh yang ditetapkan oleh peruntukan undang-undang, sebagai majikan, Serba Dinamik Group Berhad gagal, enggan dan/atau cuai untuk mengemukakan caruman bulanan KWSP pekerja-pekerjanya.

(iii) berdasarkan rekod gaji pekerja-pekerja Serba Dinamik Group Berhad yang dibekalkan kepada Plaintif dan selaras dengan Jadual Ketiga Akta 452, tunggakan caruman bulanan KWSP berjumlah RM3,158,124.00 bagi tempoh dari bulan September 2021 hingga Julai 2022 telah ditaksirkan oleh Plaintif dalam Borang E (Jadual Tunggakan Caruman).

(iv) Plaintif telah melalui surat bertarikh 24-6-2022 dan 14-10-2022 telah mengemukakan Borang E (Jadual Tunggakan Caruman) dan Borang F (Penyata Kiriman Wang Caruman Tunggakan kepada Serba Dinamik Group Berhad dan Defendan-Defendan. Namun, Serba Dinamik Group Berhad dan Defendan-Defendan gagal mengemukakan apa-apa pertikaian dan/atau maklum balas kepada taksiran Plaintif.

(v) kegagalan Serba Dinamik Group Berhad dan Defendan-Defendan mengemukakan apa-apa pertikaian dan/atau maklum balas kepada taksiran Plaintif dengan sendirinya membuktikan bahawa:

(a) maklumat dan butiran pekerja-pekerja tersebut adalah benar, tepat dan teratur.

(b) taksiran tunggakan caruman bulanan KWSP berjumlah RM3,158,124.00 bagi tempoh dari bulan September 2021 hingga Julai 2022 adalah tepat dan muktamad.

(vi) Plaintif telah membuat tolakan kepada bayaran yang telah dibuat oleh Serba Dinamik Group Berhad dan Defendan-Defendan dan baki yang masih terhutang ialah sebanyak RM2,951,000.00 (tidak termasuk dividen dan caj lewat bayar ke atas tunggakan caruman bulanan KWSP bagi tempoh tersebut) menurut tempoh dan jumlah liabiliti Pengarah-Pengarah Serba Dinamik Group Berhad.

(vii) pengenaan dividen dan caj lewat bayar ke atas tunggakan caruman bulanan KWSP yang gagal dibayar dalam tempoh yang dinyatakan adalah dibenarkan menurut peruntukan seksyen 45(3) dan seksyen 49 Akta 452.

(viii) isu mengenai penggulungan Serba Dinamik Group Berhad dan pelantikan Interim Liquidator, Plaintif menyatakan bahawa tuntutan Plaintif dalam guaman ini adalah bagi tempoh dari bulan September 2021 hingga bulan Julai 2022. Pelantikan Interim Liquidator ialah pada 23-8-2022 dan tuntutan Plaintif ialah terhadap pengarah-pengarah Serba Dinamik Group Berhad iaitu Defendan-Defendan. Isu yang dibangkitkan ini adalah tidak relevan.

[8] In the affidavit in support, the plaintiff *vide* the affidavit affirmed by Pengurus, Seksyen Pendakwaan dan Litigasi, Jabatan Undang-Undang, together with the supporting documents *ie*,:

(i) a copy of Borang KWSP 1 (permohonan pendaftaran majikan) dated 18 March 2008.

(ii) a copy of information of the company *via* SSM search dated 17 November 2022 and the search on the winding up of the company dated 20 February 2023.

(iii) a copy of the employees' salary record.

(iv) a copy of Borang E (jadual tunggakan caruman) dan Borang F (penyata kiriman wang caruman tunggakan.

(v) a copy of pengesahan bayaran oleh cawangan dated 8 March 2023.

(vi) a copy of list of dividend and late payment charge as declared by the plaintiff.

(vii) a copy of the details of the directors/officers as per the SSM search dated 17 November 2022.

(viii) a copy of perakuan tuntutan caruman yang kena dibayar di bawah s. 64 of Act 452 dated 8 March 2023 against first, second, third and fourth defendants.

Therefore, on the advice of the plaintiff's solicitor, the plaintiff applied for the summary judgment to be entered against all the defendants. The defendants had no defence against the plaintiff's claims and there are no issues to be tried.

The Law On Summary Judgment

[9] The test is set out in the Supreme Court decision of *National Company For Foreign Trade v. Kayu Raya Sdn Bhd* [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283; [1984] 2 MLJ 300, where it was held:

> We think it appropriate to remind ourselves once again that in every application under Order 14, the first considerations are (a) whether the case comes within the order and (b) whether the plaintiff has satisfied the preliminary requirements for proceeding under Order 14. For the purpose of an application under Order 14, the preliminary requirements are:
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> (i) the defendant must have entered an appearance;
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> (ii) the statement of claim must have been served on the defendant; and
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> (iii) the affidavit in support of the application must comply with the requirements of rule 2 of Order 14.
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> If the plaintiff fails to satisfy either of these considerations the summons may be dismissed. If however, these considerations are satisfied, the plaintiff will have established a *prima facie* case and he becomes entitled to judgment. The burden then shifts to the defendant to satisfy the Court why judgment should not be given against him.

[10] Once the burden has shifted, the defendant must be able to show by affidavits whether he has raised a triable issue (refer to the case of *South East Asia Insurance Bhd v. Kerajaan Malaysia* [1998] 1 CLJ 1045; [1998] 1 AMR 657).

[11] Whether an issue is or is not triable must necessarily depend on the facts or the law arising from each case as disclosed in evidence before the court (refer to the case of *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14; [1992] 1 MLJ 400).

[12] Where all the issues are clear and the matter in substance can be decided once and for all without going to trial, the matter ought to be decided under O. 14 application (refer to the case of *Citibank NA v. Ooi Boon Leong & Ors* [1980] 1 LNS 168; [1981] 1 MLJ 282).

[13] The court has a wide discretion not to allow the plaintiff to enter summary judgment if the court for some other reason view there ought to be a trial of the whole or part of the claim. (Refer to O. 14 r. 3(1) and refer to the case of *Concentrate Engineering Pte Ltd v. United Malayan Banking Corp Bhd* [1990] 1 LNS 41; [1990] 3 MLJ 1).

[14] In *Doshi v. Yeoh Tiong Lay* [1974] 1 LNS 30; [1975] 1 MLJ 85, the Federal Court held:

> The purpose of O. 14 of the Rules of Supreme Court 1975 is to enable the Plaintiff to obtain summary judgment without trial if he can prove his case clearly, and if the defendant is unable to set up a *bona fide* defence or raise an issue against the claim which ought to be tried, final judgment should be allowed.

[15] The above principle in *Doshi* (*supra*) was adopted by the Court of Appeal in *Ho Lai Ying & Anor v. Cempaka Finance Bhd* [2004] 1 CLJ 232 where it stated as follows:

> Thus a plaintiff would be entitled to obtain summary judgment without a trial if he can prove his case clearly which to us would mean the plaintiff has to establish the existence of certain facts and must prove that those facts exist before the court can determine the issue against the claim which ought to be tried.

[16] The test for an application for summary judgment under O. 14 of the Rules of Court 2012 is such, that the defendants must show on affidavit evidence that the defence has not only raised an issue, but also that the said issue is triable (see *Woolley Development Sdn Bhd v. Mikien Sdn Bhd* [2008] 2 CLJ 303; [2008] 1 MLJ 585; *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14; [1992] 1 MLJ 400).

[17] The Court of Appeal in *Pengiran Othman Shah Pengiran Mohd Yussof & Anor v. Karambunai Resorts Sdn Bhd & Ors* [1996] 1 CLJ 257; [1996] 1 MLJ 309 held that:

> Where the affidavit evidence discloses a dispute of facts, such facts must be analysed, and if they are found to be inconsistent with undisputed contemporary documents or inherently improbable in themselves, the court is entitled to reject those facts and proceed upon the undisputed contemporaneous documentary evidence.

[18] As to defence to such application, the Court of Appeal in *Chen Heng Ping & Ors v. Intradagang Merchant Bankers (M) Bhd* [1995] 3 CLJ 690, Mahadev Shanker JCA held at p. 693:

> When an application is made for summary judgment under O. 14 supported by an affidavit which goes to show that there is no defence, the defendants must show cause why leave to defend must be given. This means that the defendants must provide answers on oath which

constitute evidence that they have a defence which is fit to be tried. Denials in a defence do not constitute evidence. They are challenges to the other side to show proof ...

[19] In *South East Asia Insurance Bhd v. Kerajaan Malaysia* [1998] 1 CLJ 1045, Shaik Daud Ismail JCA at p. 1048 held:

It is well settled that if a defendant in an O. 14 application succeeds in raising even a single triable issue, it will not be a fit case and proper case to order summary judgment. It is only in plain and obvious cases where there are no issues to be tried should recourse be had to O. 14.

[20] The Court of Appeal, Malaysia in *Best Re (L) Ltd v. China Pacific Property Insurance Co Ltd* [2018] 1 LNS 654, held:

[36] In the dissenting judgment of Gunn Chit Tuan SCJ, it was observed that:

The scope of O. 14 proceedings meant for cases which are virtually uncontested or uncontestable is now determined by the Rules of the High Court 1980. Generally where a defendant shows that he has a fair case for defence, or reasonable grounds for setting up a defence, or even a fair probability that he has a *bona fide* defence, he ought to have leave to defend. Order 14 is not intended to shut out a defendant. The jurisdiction should only be exercised in very clear cases (*Malayan Insurance (M) Sdn Bhd v. Asia Hotels Sdn Bhd; Gunung Bayu Sdn Bhd v. Syarikat Pembinaan Perlis Sdn Bhd*). It was held in the well-known House of Lords' case of *Jacobs v. Booth's Distillery Co* that a complete defence need not be shown. The defence need only to show that there is a triable issue or question or that for some other reason there ought to be a trial, and leave to defence ought to be given, in fact, even though the defence is not clearly established, but only reasonably probability of there being a real defence, leave to defend should be given (*Manger v. Cash*).

[21] Those principles enunciated by Gunn Chit Tuan SCJ remind that summary judgment should only be entered in the "virtually uncontested or incontestable cases". The process should never be used to shut out a defendant.

[22] In the case of *Juliana Quah Kooi Hong v. LFE Corporation Bhd & Anor* [2021] 1 LNS 1765, YA Mohd Nazlan Mohd Ghazali (Yang Arif as he then was) has held:

[59] This is an application for summary judgment under Order 14 of the Rules of Court 2012. It is well-established and already settled law that once an Order 14 application is shown to have been correctly and properly filed, the burden shifts and thus rests on the defendant who desires to resist the application to raise a defence which shows a "*bona fide* triable issue", in the sense of an issue which justifies and warrants the matter

to be considered at the trial proper (see the Supreme Court decision in *National Company For Foreign Trade v. Kayu Raya Sdn Bhd* [1984] 2 MLJ 300).

[60] As the plaintiff has satisfied these preliminary requirements, and this is not disputed by the defendants the burden was firmly on the defendants to show that there is a triable issue that does not justify summary judgment be entered against them. If the defendants can demonstrate even one triable issue, this Court will not grant summary judgment. But it has to be a genuinely triable issue. As made clear by the Federal Court in *Voo Min En & Ors v. Leong Chung Fatt* [1982] 2 MLJ 241, it is not enough for a defendant to raise an issue as would require a trial in order to determine it.

[61] However, when viewed in totality, the averments and arguments raised by the defendants are considerably inflicted by various shortcomings that do little, if at all, to advance its resistance to the summary judgment application. Above all, the case of the defendants is also riddled with averments which are not substantiated. It is trite that mere bare denials or assertions do not constitute evidence and they cannot give rise to triable issues (see the Court of Appeal decision in *Chen Heng Ping & Ors v. Intradagang Merchant Bankers (M) Bhd* [1995] 2 MLJ 363).

[62] Reference should also be made to the leading judgment of the former Supreme Court on summary judgment application in *Bank Negara Malaysia v. Mohd Ismail & Ors* [1992] 1 CLJ 627 which held as follows:

> Under an O. 14 application, the duty of a Judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other on affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent or is inherently improbable in itself, then the Judge has a duty to reject such assertion or denial, thereby rendering the issue as not triable. In our opinion, unless this principle is adhered to, a Judge is in no position to exercise his discretion judicially under an O. 14 application. Thus, apart from identifying the issues of fact or law, the Court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.

Findings, Evaluation And Decision

[23] Learned counsel for the defendants submits that:

3.1 tuntutan yang dibuat oleh Plaintif terhadap Defendan-Defendan berbentuk *mala fide* dan hanyalah untuk menyusahkan Defendan-Defendan.

3.2 Defendan-Defendan mempunyai pembelaan kukuh dan bermerit.

First Issue: Whether The Plaintiff's Claims For The Unpaid EPF Contributions Against The Defendants Are Made Mala Fide?

[24] To support its contention, learned counsel for the defendants submits that the following facts are *mala fide*:

(a) pengarah-pengarah Serba Dinamik Group Berhad telah dinamakan dan/atau dijadikan sebagai Defendan-Defendan dalam tindakan ini atas kelalaian dan/atau kegagalan mereka dalam melakukan pembayaran bagi caruman KWSP pekerja-pekerjanya.

(b) Plaintif tidak boleh menafikan hakikat bahawa pada atau sekitar tahun 2021 dan berterusan sehingga kini, Serba Dinamik Group Berhad menghadapi krisis kewangan yang telah secara langsung menyebabkan aliran kewangan syarikat dan anak syarikatnya terjejas dan terkesan.

(c) pada 10-2-2022, Serba Dinamik Group Berhad memohon kepada Mahkamah Tinggi Kuala Lumpur untuk meletakkan syarikat di bawah pengurusan kehakiman dan bagi pelantikan pengurus kehakiman.

(d) Serba Dinamik Group Berhad telah digulungkan dan Interim Liquidator dilantik untuk menguruskan syarikat.

[25] Learned counsel for the defendants submits that "kami dengan rendah diri berhujah bahawa, pada setiap masa material, plaintif selaku badan berkanun (statutory body) mempunyai pengetahuan penuh akan kedudukan syarikat di mana sejak 23 Ogos 2022, syarikat berada dalam kuasa dan kawalan interim liquidator dan ianya termasuk pengurusan syarikat termasuk urus niaga dan pembayaran dan/atau kewangan."

[26] In the statement of claim itself, the plaintiff knows that Victor Saw Seng Kee from PricewaterhouseCoopers Advisory Services Sdn Bhd has been appointed as interim liquidator. Due to this, the defendants have no power and control over the company including the payments of EPF contributions for its employees.

Findings Of The Court

[27] The fact that the plaintiff has knowledge about the winding up of the company and the appointment of interim liquidator is not *per se* an action of *mala fide*. Nothing pleaded in the defence that the plaintiff has acted *mala fide*.

[28] The action for non-payment of the EPF contributions was instituted by the plaintiff, this is the statutory duty of the plaintiff. The action is not implying any bad faith or any dishonest intention or corrupt motive or personal animosity or vendetta on the part of the plaintiff.

A *Second Issue: Whether The Defendants As The Directors Of The Company Are Not To Be Held Responsible To Pay The EPF Contributions?*

[29] Learned counsel for the defendants submits that the failure of the plaintiff to:

B (i) name the company as one of the defendant since the company is registered as the employer;

(ii) name interim liquidator as one of the defendant since the company has been wound up; and

C (iii) file and/or serve the proof of debt to interim liquidator in order to be the preferential creditor,

are proof that the directors (defendants) can wash their hands off from performing their duties.

[30] Learned counsel for the defendants avers that:

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> 5.15 Kami ingin menegaskan di sini bahawa pada setiap masa material, peruntukan di bawah seksyen 46 Akta KWSP tidak terpakai dalam kes ini. Memandangkan syarikat SDGB telahpun digulungkan dan peruntukan di bawah seksyen 46 Akta KWSP juga tidak menerangkan dan/atau memperuntukkan kedudukan pengarah-
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> E pengarah pada masa sedemikian tidak diperuntukkan dengan nyata.
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> 5.15.1 Dalam apa jua keadaan, kegagalan Plaintif dalam menamakan syarikat SDGB selaku majikan dalam tindakan ini sendiri tidak menepati peruntukan seksyen 46 Akta KWSP. Plaintif telah membuat pilihan sendiri untuk
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> F menamakan dan/atau memulakan tindakan guaman ini tanpa menepati peruntukan seksyen 46 Akta KWSP tersebut.
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> 5.16 … tindakan Plaintif untuk menamakan pengarah-pengarah syarikat SDGB selaku Defendan-Defendan dalam tindakan ini dan menjadikan mereka bertanggungan secara peribadi atas kegagalan
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> G dan/atau kelalaian Interim Liquidator tersebut untuk membayar caruman wang KWSP pekerja-pekerja meskipun Plaintif tahu akan kedudukan dan/atau posisi sebenar syarikat SDGB yang berada di bawah kawalan dan/atau kuasa penuh Interim Liquidator.
>
> xxx.
>
> H 5.18 Dengan menggunakan prinsip dan/atau penghakiman dalam kes *Salomon v. Salomon & Co. Ltd*, kami dengan rendah diri berhujah bahawa "the incorporation of the company created a separate person …

[31] It is crystal clear that the cause of action against all the defendants is for the outstanding EPF contribution is based under s. 46(1) of Act 452, that I reads:

Part V – Contributions To The Employees Provident Fund

Section 46. Joint and several liability of directors, *etc.*

(1) Where any contributions remaining unpaid by a company, a firm or an association of persons, then, notwithstanding anything to the contrary in this Act or any other written law, the directors of such company including any persons who were directors of such company during such period in which contributions were liable to be paid, or the partners of such firm, including any persons who were partners of such firm during such period in which contributions were liable to be paid, or the office-bearers of such association of persons, including any persons who were office-bearers of such association during such period in which contributions were liable to be paid, as the case may be, shall together with the company, firm or association of persons liable to pay the said contributions, be jointly and severally liable for the contributions due and payable to the Fund.

(2) For the purpose of this section:

"contribution" shall be deemed to include any dividend and late payment charges due on any contributions;

[32] The unpaid EPF contribution to and as identified by the plaintiff is for the contributions remaining unpaid by the company that is for the period from September 2021 to July 2022. The plaintiff's calculation is based on the employees' salary record as submitted by the company. The calculation is then be assessed and stated in Borang E (jadual tunggakan caruman) and be served on the company.

[33] The fact that the company has been wound up on 10 January 2023, therefore, this action is proceeded against the defendants on their capacity at the material time as the registered directors of the company.

[34] Section 46(1) of Act 452 provides that it is a mandatory for and the directors are liable to pay the said contributions, be jointly and severally.

[35] With two arguments *vide* submission by learned counsel for the plaintiff and the defendants pertaining to s. 46 of Act 452, the Federal Court decision in *Lembaga Kumpulan Wang Simpanan Pekerja v. Edwin Cassian Nagappan* [2021] 7 CLJ 823, at p. 834, YA Nallini Pathmanathan FCJ delivering the judgment of the court, held:

The EPF Act

[36] The instant appeal concerns a consent judgment entered into between the parties. Of primary importance is s. 46 of the EPF Act which imposes joint and several liability on the directors of a company for unpaid contributions. These provisions must be given full effect, as they comprise statutory law. It is not open to the courts to stultify, vary or whittle down the clear provisions promulgated by Parliament in relation to liability for EPF contributions, by construing judgments in manner which is not consonant with the EPF Act. In short, the EPF Act prevails over the terms of the judgment.

Our Analysis And Decision The Law: Joint, Several, and Joint and Several Liability – General Principles

[16] Joint liability arises when two or more persons jointly promise to do the same thing. There is only one obligation or promise, and consequently, performance by one person discharges the others. In the case of a joint promise, the obligation is single and entire. It is extinguished by a judgment and decree in a suit against any one of the joint promisors: see *In Re Vallibhai Adamji* 1933 Indlaw Mum 179, AIR 1933 Bom 407.

[17] Several liability, on the other hand, arises when two or more persons make separate promises to another, whether by the same instrument or by different instruments. There is more than one obligation or promise, as compared to joint liability where there is one obligation or promise.

[18] A joint and several promise is different from a joint promise. Joint and several liability arises when two or more persons in the same instrument jointly promise to do the same thing and also severally make separate promises to do the same thing. Joint and several liability gives rise to one joint obligation and to as many several obligations as there are joint and several promisors: see *In Re Vallibhai Adamji* (*supra*).

[36] The principles that "s. 46 of the EPF Act which imposes joint and several liability on the directors of a company for unpaid contributions. These provisions must be given full effect, as they comprise statutory law. It is not open to the courts to stultify, vary or whittle down the clear provisions promulgated by Parliament in relation to liability for EPF contributions" must be adhered to and applying the principles to this case before me, the fact that there is unpaid and remaining balance of contribution due and payable to the plaintiff, the defendants shall be held liable.

[37] Under s. 65(1) of Act 452, all EPF contributions can be recovered summarily as a civil debt.

[38] The averment by the defendants that "tindakan plaintif untuk menamakan pengarah-pengarah syarikat SDGB selaku defendan-defendan dalam tindakan ini dan menjadikan mereka bertanggungan secara peribadi atas kegagalan dan/atau kelalaian interim liquidator tersebut untuk membayar caruman wang KWSP pekerja-pekerja meskipun plaintif tahu akan kedudukan dan/atau posisi sebenar syarikat SDGB yang berada di bawah kawalan dan/atau kuasa penuh interim liquidator".

Findings Of Court

[39] This court finds that the defendants had totally ignored the "during period" that was spelt out clearly in the statement of claim. The plaintiff only claims for the contributions remaining unpaid by the company that is for the period from September 2021 to July 2022.

[40] The extract from learned counsel for the plaintiff is reproduced and this court agrees with the plaintiff's contentions:

> 16. Sehubungan dengan itu, Plaintif menghujahkan bahawa status penggulungan Syarikat tersebut termasuk perlantikan Interim Liquidator dan/atau Pelikuidasi Mutlak bagi Syarikat tersebut pada hakikatnya:
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> 16.1 TIDAK relevan dengan tuntutan Plaintif memandangkan tempoh caruman September 2021 hingga Julai 2022 yang menjadi asas tuntutan Plaintif di sini adalah tidak melibatkan tempoh penggajian pekerja sebelum Syarikat tersebut digulung iaitu **caruman KWSP ke atas gaji pekerja bagi bulan Ogos 2021 hingga Jun 2022.**
>
> 16.2 TIDAK menghentikan, melupuskan dan/atau mengecualikan liabiliti Defendan-Defendan terhadap tuntutan Plaintif dalam tindakan ini.
>
> 16.3 TIDAK menghalang tuntutan Plaintif terhadap Defendan-Defendan bersandarkan kepada prinsip "tanggungan peribadi dan individu" (jointly and severally liable) yang diperuntukkan oleh Seksyen 46 Akta KWSP 1991. (emphasis added)

[41] The defendants had dragged interim liquidator into this action without any basis. There is no reply, affidavit and/or statement from interim liquidator when the defendants firmly pleaded that "kegagalan dan/atau kelalaian interim liquidator tersebut untuk membayar caruman wang KWSP pekerja-pekerja".

[42] The crucial importance of contemporaneous documents produced by the plaintiff is somewhat safer to refer to. In the case of *Lionel Khoo Boo Kheng v. Lembaga Kumpulan Wang Simpanan Pekerja* [2016] 1 LNS 370; [2016] MLJU 1219, YA Collin Lawrence Sequerah (Yang Arif as he then was) has held that:

> [36] I accept the Respondent's contention above, as the sum shown in paragraph 5 of the Statement of Claim of RM947,681.00 is derived from the Form E which constitute *prima facie* and conclusive evidence. …

See also the decisions in *Hijau Bumi Petroleum Sdn Bhd v. Platinum Green Chemicals Sdn Bhd & Ors* [2017] 1 LNS 1253; [2017] 8 AMR 684 and *Juliana Quah* (*supra*).

[43] Based on the SSM information/search done by the plaintiff, the natures of the company are investment holdings and provision of management services. The company has a huge capital and the issue regarding the company is facing with financial crisis is irrelevant to the EPF contribution for its employees.

[44] The company has variety types/job grades of employees *ie*, the senior executives, executives, and managers, and Act 452 is the Act that provides for the law relating to a scheme of savings for employees' retirement and the management of the savings for the retirement purposes. The defendants are liable and compelled to pay for the unpaid EPF contributions that is the statutory payment to the plaintiff.

Third Issue: Whether The Summary Application Can Be Entered Against The Defendant?

[45] The test for an application for summary judgment under O. 14 of the Rules of Court 2012 is such, that the defendants must show on affidavit evidence that the defence has not only raised an issue, but also that the said issue is triable.

[46] Learned counsel for the defendants submits that the defendants had a good and merit in the defence. Paragraphs 5.19 to 5.25 in the written submission of the defendants are the same submission as raised earlier.

[47] The defendants raised the following issues that are triable and must go with trial and not by way of summary judgment. The issues are:

(i) whether the defendants are the parties liable and/or responsible to pay for the outstanding EPF contributions?

(ii) whether interim liquidator is liable and/or responsible to pay for the EPF contributions for the period of September 2021 to July 2022 since interim liquidator has taken over the affairs of the company?

(iii) whether the provision of s. 46 of Act 452 has been complied with when the plaintiff has failed to claim against the company who is the employer in this action?

(iv) whether the plaintiff has made double claims against the defendants?

[48] Learned counsel for the defendants cited the High Court case of *Ascot International Pte Ltd v. Elevic Trading Sdn Bhd* [1996] 2 CLJ 645 where YA KL Rekhraj JC held:

> To oppose an O. 14 application for summary judgment, the Defendant must satisfy the Court that there is an issue or question in dispute to be tried between the parties; or that there ought for some other reason to be a trial of that claim. In an action of this nature – for goods sold and delivered – the defendants have pleaded triable/disputed facts by:
>
> i. filing the affidavits in opposition; and
>
> ii. filing a defence – which on the face of it appears to be a bare-denial but in substance a defence.

[49] As repeatedly argued and submitted by learned counsel about "*mala fide*, mistake in calculation of the dividend and late payment charges, error in the amount claimed", are evidence that the plaintiff has confused and/or inaccurate and/or overlap claims are evidences that this court should dismiss the summary judgment and then proceed with a full trial to hear the defendants.

Findings Of Court

[50] Under s. 65(1) of Act 452, all EPF contributions can be recovered summarily as a civil debt.

[51] This case is not a claim for goods sold and delivered. The plaintiff just took the legal action to impose the statutory law against the defendants. Generally, the O. 14 application is suitable only for liquidated claims.

[52] The defendants resist the plaintiff's application for summary judgment and maintain that there are serious issues to be tried which warrant the dispute being resolved only after a full trial of the matter. The defendants' defence is filed and the defendants contend that the matters raised comprise 'triable' issues.

[53] Whether the triable issues existed and disposal must be by way of trial? After considering the affidavits and submissions, this court is of the view that the plaintiff's application has satisfied the requirements of O. 14 rr. 1 and 2 of the Rules of Court 2012. The defendants had failed to prove that there were issues that merit a trial. On the facts and circumstances of this case, I find that this case was appropriate for the summary judgment. I am able to so conclude without this matter going to trial because the subject matter in this matter is consistent with the documents produced by the plaintiff in its affidavits, there are:

(i) Borang E (jadual tunggakan caruman).

(ii) perakuan tuntutan caruman yang kena dibayar di bawah s. 64 Akta 452.

(iii) surat tuntutan bertarikh 21 November 2022 yang dikeluarkan oleh peguam cara plaintif.

(iv) butiran tuntutan bagi baki tunggakan caruman bulanan KWSP pekerja-pekerja syarikat bagi bulan September 2021 hingga Julai 2022.

[54] Pertaining to the issue raised by learned defendants' counsel about "sama ada surat bertarikh 24 Jun 2022 dan 14 Oktober 2022 boleh diguna pakai dan/atau dikemukakan di mahkamah ini atas sebab penggunaan perkataan "tanpa prejudis", this court agree with the plaintiff that this issue or argument only raised in the defendants' written submission in reply and nothing pleaded in the defence.

[55] Further, the issue on the appointment of the interim liquidator has been raised before by the defendants and answers given by the plaintiff are:

(i) bagi tempoh dari bulan September 2021 hingga Julai 2022 iaitu tempoh yang ditetapkan oleh peruntukan undang-undang, sebagai majikan, Serba Dinamik Group Berhad gagal, enggan dan/atau cuai untuk mengemukakan caruman bulanan KWSP pekerja-pekerjanya.

(ii) berdasarkan rekod gaji pekerja-pekerja Serba Dinamik Group Berhad yang dibekalkan kepada Plaintif dan selaras dengan Jadual Ketiga Akta 452, tunggakan caruman bulanan KWSP berjumlah RM3,158,124.00 bagi tempoh dari bulan September 2021 hingga Julai 2022 telah ditaksirkan oleh Plaintif dalam Borang E (Jadual Tunggakan Caruman).

(iii) Plaintif telah melalui surat bertarikh 24-6-2022 dan 14-10-2022 telah mengemukakan Borang E (Jadual Tunggakan Caruman) dan Borang F (Penyata Kiriman Wang Caruman Tunggakan kepada Serba Dinamik Group Berhad dan Defendan-Defendan. Namun, Serba Dinamik Group Berhad dan Defendan-Defendan gagal mengemukakan apa-apa pertikaian dan/atau maklum balas kepada taksiran Plaintif.

(iv) kegagalan Serba Dinamik Group Berhad dan Defendan-Defendan mengemukakan apa-apa pertikaian dan/atau maklum balas kepada taksiran Plaintif dengan sendirinya membuktikan bahawa:

(a) maklumat dan butiran pekerja-pekerja tersebut adalah benar, tepat dan teratur.

(b) taksiran tunggakan caruman bulanan KWSP berjumlah RM3,158,124.00 bagi tempoh dari bulan September 2021 hingga Julai 2022 adalah tepat dan muktamad.

(iv) Plaintif telah membuat tolakan kepada bayaran yang telah dibuat oleh Serba Dinamik Group Berhad dan Defendan-Defendan dan baki yang masih terhutang ialah sebanyak RM2,951,000.00 (tidak termasuk dividen dan caj lewat bayar ke atas tunggakan caruman bulanan KWSP bagi tempoh tersebut) menurut tempoh dan jumlah liabiliti Pengarah-Pengarah Serba Dinamik Group Berhad.

(v) pengenaan dividen dan caj lewat bayar ke atas tunggakan caruman bulanan KWSP yang gagal dibayar dalam tempoh yang dinyatakan adalah dibenarkan menurut peruntukan seksyen 45(3) dan seksyen 49 Akta 452.

(vi) isu mengenai penggulungan Serba Dinamik Group Berhad dan pelantikan Interim Liquidator, Plaintif menyatakan bahawa tuntutan Plaintif dalam guaman ini adalah bagi tempoh dari bulan September 2021 hingga bulan Julai 2022.

Pelantikan Interim Liquidator ialah pada 23-8-2022 dan tuntutan Plaintif ialah terhadap pengarah-pengarah Serba Dinamik Group Berhad iaitu Defendan-Defendan. Isu yang dibangkitkan ini adalah tidak relevan.

[56] Guided by the principles to allow the summary judgment to the facts of this case, this court finds that there are no manifest errors made by the plaintiff and this is a plain and obvious case with no issues to be tried, which would be suitable for judgment to be granted summarily.

Conclusion

[57] Having evaluated the facts and law arising from this case, I have, in the foregoing, determined that the defendants have so plainly failed to raise any triable issue or reasonable defence. I additionally find that the arguments raised by the defendants to be entirely at variance from and not consistent with either the clear position in law or the undisputed contemporary documents. The resistance of the defendants is futile and must therefore fail.

[58] It therefore follows that the defendants had no defence to the plaintiff's claim. For these reasons, I am satisfied that the plaintiff has established its claim *vide* this interlocutory application.

[59] In view of the foregoing, it is my judgment that having evaluated the evidence, I allowed the application for summary judgment.

[60] It is clear that the plaintiff has satisfied the threshold requirement under O. 14 of the Rules of Court 2012 to entitle it to a final judgment.